Maine Freedom of Information Coalition

PO Box 232, Augusta, Maine 04332

December 15, 2017

Via E-Mail Only (lawcourt.clerk@courts.maine.gov)

Matthew Pollack, Executive Clerk
Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, Maine 04101

Re. Recommendations Presented to the Court in the Report of the Task Force on Transparency and Privacy in Court Records
Comments by the Maine Freedom of Information Coalition

Dear Mr. Pollack:

The Maine Freedom of Information Coalition (the "Coalition") provides these comments on the recommendations by the Task Force on Transparency and Privacy in Court Records concerning public access to online Maine court records.

The Coalition urges the Judicial Branch to allow public access to all public court records online because (A) transparency is—as the Charter forming the Task Force recognizes—"a critical component of public trust and confidence" in our justice system; (B) the public would benefit greatly by more efficient access to public court records and information; (C) the reasons advanced for prohibiting online public access are not compelling; and (D) a sweeping prohibition against public access to online public court records is overbroad.

The Coalition's mission is to broaden knowledge and awareness of the First Amendment and the value of an open, accountable, and transparent government. The members of the Coalition include the Maine Association of Broadcasters, the League of

Women Voters of Maine, the Maine Library Association, the Maine Press Association, the Society of Professional Journalists, and a representative of academic/government interests. A member of the Coalition serves on the Legislature's Right to Know Advisory Committee as the representative of a statewide coalition of advocates of freedom of access by appointment of the Speaker of the House pursuant to Title 1, Section 411. The Coalition has appeared before the Law Court in cases involving public access to government records and information in four appeals, *MacImage of Maine v. Androscoggin Cty*, 2012 ME 44, 40 A.3d 975, *MaineToday Media v. State*, 2013 ME 100, 82 A.3d 104, *Pinkham v. Dept. of Transp.*, 2016 ME 74, 139 A.3d 904, and *In re. Conservatorship of Emma*, 2017 ME 1, 153 A.3d 102.

## I. Transparency is a bedrock principle of our justice system.

The notion of "privacy" is anathema to our justice system—we don't do justice in secret in this country.[1] The courts do not operate in obscurity, with meaningful access limited to persons deemed worthy of finding out what's going on. Secrecy of judicial action "can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges[,]" limit public understanding of the rule of law and the functioning of the courts, and degrade the quality of the justice system by

[1] *See, e.g., United States v. Foster*, 564 F.3d 852, 854 (7th Cir. 2009) ("the law could not be clearer" that "a witness's or a litigant's preference for secrecy" is not good reason to seal court records); *Siedle v. Putnam Inv., Inc.*, 147 F.3d 7, 10 (1st Cir. 1998) (that "[t]he mere fact that judicial records may reveal potentially embarrassing information is not in itself sufficient reason to block public access."); *Doe v. Heitler*, 26 P.3d 539, 544 (Colo. App. 2001); *Doe v. New York Univ.*, 786 N.Y.S.2d 892, 902 (N.Y. Sup.Ct. 2004); *see also* Sigmund D. Schutz, Public Access to Judicial Proceedings and Records in Maine: Worth Protecting, 27 Me.B.J. 198 (Fall 2012) (referencing U.S. Supreme Court authority on the importance of an open and public justice system).

limiting the "cleansing effects of exposure and public accountability."[2] Openness and transparency enhances fairness, integrity, and public confidence in and respect for the judicial process. Going to court is a public act, involving a public institution, paid for with taxpayer funds, and judicial officers wield great power. Secrecy is corrosive to the justice system.

It is no accident that only the records and proceedings of the judicial branch—unique among the branches of government—are subject to a constitutional right of public access.[3] Unlike the leaders of other branches of government, judicial officers are not elected in Maine, and thus the legitimacy of judicial action depends to a special degree on the fact that justice is done in public. To erect barriers to public access to court records that restrict the free flow of information about judicial proceedings would be contrary to basic notions of justice in this country and norms of American democracy.

## II. Online access to court records would benefit the public.

Online access to court records offers a "powerful array of benefits."[4] Those benefits include:

1. Improving Accountability and Oversight. Judges must be accountable to the public by letting the people know how and why they use their power to impose a sentence, to render a judgment, or to take any of the other life-altering actions the

---

[2] *Neb. Press Ass'n v. Stewart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring).
[3] See, e.g., *Courthouse News Service v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014).
[4] Lynn M. LoPucki, "The Future of Court System Transparency," in *Confidentiality, Transparency, and the U.S. Civil Justice System* (Joseph W. Doherty, Robert T. Reville, and Laura Zakaras, eds., 2012) at 165 ("LoPucki"). Some of what follows paraphrases this work.

people entrust to courts every day in Maine.[5] "The theory seems to be that if government transactions are recorded and made public, (1) corrupt transactions are more likely to be discovered, and (2) the threat of discovery will deter corrupt transactions."[6] Secrecy fosters corruption, but transparency exposes and deters it–and greater and more efficient transparency would do more exposing and deterring.

2. Informing the Public and the Legislature. With online access, the public stands to learn more, and learn faster, about Maine's justice system than would be possible under a courthouse-only records-access system. Researchers, academics, historians, and others would benefit from more efficient access to court records. At the federal level, "hundreds, if not thousands of researchers use data extracted from PACER" to perform this sort of important scholarship.[7] Online access to court records would allow similar useful work in Maine. Online access will also better inform the Legislature. "Court system transparency can show legislatures . . . how courts are in fact implementing the laws."[8] Legislators benefit from more complete and timely access to court records showing how statutes are being interpreted and enforced, and how those statutes affect Mainers.

3. Informing Lawyers and Litigants. Court records provide useful information to parties engaged with the justice system. Who is litigating what cases, against whom, and why? What are the outcomes? How are judges deciding cases? "By making information available regarding the outcomes in similar cases, court system

---

[5] *Id.* at 181.
[6] *Id.* at 168.
[7] *Id.* at 165.
[8] *Id.* at 169.

transparency would enable the parties to more accurately predict the outcomes of their cases."[9] With online public access lawyers could research expert witnesses, access jury instructions, and better prepare their own cases.[10]

Online access levels the playing field by allowing all stakeholders in the justice system an equal opportunity to find out what's going on. The District Attorneys and the Attorney General have access to all criminal matters within their jurisdiction because they represent the state, and thus have online access to all dispositions, sentencing decisions, orders on motions to suppress, and other useful information. But defense lawyers do not. As recommended, they would only have online access to the cases in which they are personally involved. Online public access to court records would cure this problem.

4. Improving News Reporting. The news media, and by extension the public reading or watching the news, benefits from online access to court records. For the news media, delay and cost are substantial barriers to obtaining court records and can influence the timeliness, accuracy and completeness of news reporting about what goes on in court. News organizations have limited time and resources to travel to courthouses to look up records that could easily be made immediately available online. Making court records available to the public only at courthouses makes news reporting more expensive, and delays reporting when the courthouse is closed. News is news when it happens, not hours or days later when a reporter is able to travel to a courthouse

[9] *Id.* at 171.
[10] *Id.* at 181.

and look up a record. Online access to court records makes it easier and less expensive for the news media to do a better job of informing the public.

5. Access to Justice and Administrative Benefits. The public will have more efficient and less expensive access to justice by remotely accessing court records. Remote access saves time and money. Mainers should not have to pay their lawyers to travel to the courthouse to look for court records when technology would allow the court at no additional cost to provide online access to any public court record in any case. Online access to judicial records also equalizes access for disabled persons unable to travel to the courthouse[11] and for others who cannot travel to a courthouse during normal business hours because of family or work obligations.

By making public court records available online, the Judicial Branch will save the considerable time and effort now spent by the clerk's office responding to requests to inspect and copy court records.

## III. Neither identity theft risks nor "practical obscurity" are compelling reasons to keep public court records offline.

The Task Force's recommendation to keep public court records offline seems to be based primarily on the risks of identity theft and the notion of "practical obscurity." Neither interest is compelling.

1. Identify Theft. According to a scholar who has studied online access to court records, "no evidence exists that public records have been a significant source of

[11] *Estate of Engelhard*, 127 Ohio Misc.2d 12, 19 (2004) (removing court records from the internet may implicate the Americans with Disabilities Act because "such removal may preclude access to public records for those individuals whose disabilities prevent them from traveling to the court").

information used in identity theft."[12] The New Hampshire Supreme Court came to the same conclusion.[13] There is no indication that access to court records online in other states or in federal court has caused any significant increase in the incidence of identity theft. This is unsurprising. To find information needed to commit identity theft, a thief would have to hunt through millions of pages of court records hoping to stumble upon sufficient information to commit a crime.

The risk of identity theft can be addressed by means short of an outright prohibition on public access, including rules against including sensitive information in public court records, sealing records on a case-by-case basis, and sanctioning violations of rules prohibiting the inclusion of sensitive information in public court records

2. Practical Obscurity. The other major reason given for limiting online access to court records is the notion of "practical obscurity." This is shorthand for the claim that because public court records were difficult to access before computerization, they should remain difficult to access today.[14] Underlying practical obscurity is the view that "some people are less worthy of easily viewing court documents and will do so for unjustified reasons, so we need a barrier to filter them out and limit access only to worthy users and uses."[15] The net result of practical obscurity, where public information is moving inexorably online, including information about the activities of the other

---

[12] LoPucki at 175.
[13] *Associated Press v. State*, 153 N.H. 120, 137 (2005) (rejecting a claim that avoidance of identity theft was compelling cause to seal financial affidavits given lack of any "empirical evidence linking identity theft to court documents" or evidence that a seal would "decrease the incidence of identity theft").
[14] LoPucki at 178.
[15] Tom Clarke, Court Records Privacy and Access: A Contrarian View of Two Key Issues, OPENING COURTS TO THE PUBLIC (2016) ("Clarke"), at 54, available at http://www.ncsc.org/~/media/Microsites/Files/Trends%202016/Contrarian-View-Trends-2016.ashxat 54.

branches of government, is that court records will become public in name only—with access limited to those few who are willing to spend significant amounts of time and money tracking down records.

An assumption about practical obscurity is that court records would somehow be "broadcast" to the public if made available online. But court records remain mostly obscure even when they are available online because of the huge volume of records and because they are encountered only by the few who actively search for them. In general, people are not "so singularly lacking in imagination as to become addicted to pawing through public records for no better reason" than mere pastime, whim or fancy.[16]

Another problem with the practical obscurity argument is that it rests on a misinterpretation of a 1989 U.S. Supreme Court case, *U.S. Dept. of Justice v. Reporters Cmte. for Freedom of the Press,* 489 U.S. 749 (1989).[17] In that case, the Supreme Court held that the Freedom of Information Act ("FOIA") does not require disclosure of FBI rap sheets. But unlike court records, there is no common law or First Amendment right of access to law enforcement rap sheets. Rap sheets are prepared by law enforcement to gather information that may or may not be contained in public records. Just because the FBI used some public records, among many other sometimes-confidential sources, to compile rap sheets did not make the FBI's own work product a public record under FOIA.

A more fundamental problem with the practical obscurity argument is that it is simply not compatible with the notion that court records are public. Tom Clarke of the

---

[16] Harold L. Cross, *The People's Right to Know: Legal Access to Public Records and Proceedings* (Columbia Univ. Press 1953) at 136.
[17] LoPucki at 178.

National Center for State Courts recommends against using the practical obscurity argument to justify limitations on public access to court records online, because the argument rests on a

> unique interpretation of what it means to be a public document. In no other industry or government organization is there an example of a document being declared public but only accessible by certain artificially limited means. To the contrary, if it is public the organization does everything it can to make it easily and inexpensively available as possible. It is either public or not. The idea of sort of being public, but only to the right people for the right reasons, is an oxymoron. That is the definition of limited access.
>
> A more appropriate policy response would be to simply make certain documents no longer public, including at the courthouse. Courts are loathe to do this because it then becomes obvious that they are restricting access to public documents, but it is a more honest and consistent policy response.[18]

The debate about public access to court records should be about whether particular information in a record should be public, not whether public information in public court records should be available to the public online.

## IV. A sweeping prohibition against public access to online Maine court records is an overbroad reaction to a narrow set of problems.

The majority of the Task Force recommends keeping *all* court records—regardless of the nature of the case, the information in the records, the public interest, or even the desires of the parties—offline. The court has options short of a blanket prohibition on public access to online court records. It should restrict online access only in the case of information so sensitive that no option short of secrecy will suffice. A

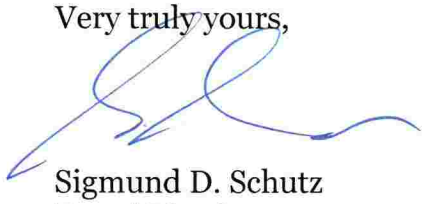
[18] Tom Clarke, Court Records Privacy and Access: A Contrarian View of Two Key Issues, OPENING COURTS TO THE PUBLIC (2016), at 55, available at http://www.ncsc.org/~/media/Microsites/Files/Trends%202016/Contrarian-View-Trends-2016.ashx

narrowly tailored approach would ensure that no more information about what goes on in court is kept from the public than is strictly necessary.

**Conclusion.**

Should the judicial branch welcome the enormous public benefits of online public access to public court records and the opportunity to enhance the efficient flow to the public of information about judicial action? "No" cannot be the answer. The Coalition urges that the Judicial Branch adopt a policy allowing online public access to public court records. Please contact me at sschutz@preti.com or 207-791-3000 with regard to these comments.

Very truly yours,



Sigmund D. Schutz
Board Member

cc: Maine Freedom of Information Coalition